A **FIRDAUS KHAN PARIT KHAN & ANOR v. CIMB BANK BHD**

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
WONG KIAN KHEONG JCA
AZIZUL AZMI ADNAN JCA
B [CIVIL APPEAL NO: W-02(A)-475-03/2021]
4 JUNE 2024

Abstract – *(i) In a scenario where the High Court's written judgment/grounds of decision is only available after the expiry of the 90 days' period (filing of record of appeal), r. 18(7) of the Rules of the Court of Appeal 1994 ('RCA') does not mandatorily require an appellant to file a record of appeal which contains a memorandum of appeal before the lapse of the 90 days' period. Rule 18(7) of the RCA is subject to r. 18(7A) of the RCA due to the use of the word 'Notwithstanding' in r. 18(7A) of the RCA. Rule 18(7A) has expressly provided that, in the mentioned scenario, an appellant 'shall' file the memorandum of appeal within three weeks after being notified of the availability of the High Court's written judgment/grounds of decision. The use of the opening words 'Notwithstanding subrule (7)' in sub-r. 7A makes it abundantly clear that r. 18(7A) is to prevail over r. 18(7); (ii) Whether or not the broad grounds of judgment of a court may contain binding ratio decidendi must depend on a proper reading of the broad grounds issued in each case. The broad grounds of a case may contain a complete analysis of the issues at hand but may omit a complete narration of the background facts. This should not relegate the grounds so issued into some lesser category of judgment. Thus, the ratio decidendi of a case in respect of which only broad grounds were issued would still operate as binding precedent for the purposes of the principle of stare decisis. Where, however, the Court of Appeal is presented with two conflicting prior decisions of the Court of Appeal, the court would be well entitled to prefer the decision containing the full grounds of judgment of the court, over the decision delivered only with broad grounds.*

H ***CIVIL PROCEDURE:*** *Appeal – Record of appeal – Whether there was mandatory requirement under r. 18(7) of Rules of the Court of Appeal 1994 ('RCA') to file record of appeal containing memorandum of appeal within 90 days of High Court's decision – High Court's written judgment only available after expiry of 90 days period – Whether r. 18(7A) of RCA provides plaintiff 'shall' file memorandum of appeal within three weeks after being notified of availability of High Court's written* I *judgment – Whether r. 18(7A) should prevail over r. 18(7) of RCA – Whether*

intervention of r. 18(1), (7) and (7A) in consonance with justice as mandated by r. 1A of RCA – Delay in filing supplemental record of appeal containing High Court's written judgment and memorandum of appeal – Whether due solely to non-availability of High Court's written judgment

CIVIL PROCEDURE: *Notice of motion – Extension of time – Application for – Application for extension of time to file memorandum of appeal – Whether there was mandatory requirement under r. 18(7) of Rules of the Court of Appeal 1994 ('RCA') to file record of appeal containing memorandum of appeal within 90 days of High Court's decision – High Court's written judgment only available after expiry of 90 days period – Whether r. 18(7A) of RCA provides plaintiff 'shall' file memorandum of appeal within three weeks after being notified of availability of High Court's written judgment – Whether r. 18(7A) should prevail over r. 18(7) of RCA – Whether intervention of r. 18(1), (7) and (7A) in consonance with justice as mandated by r. 1A of RCA – Delay in filing supplemental record of appeal containing High Court's written judgment and memorandum of appeal – Whether due solely to non-availability of High Court's written judgment*

CIVIL PROCEDURE: *Judgment – Grounds of judgment – Broad grounds – Whether binding – Whether per incuriam r. 18(7A) of Rules of the Court of Appeal 1994 – Principle of stare decisis*

STATUTORY INTERPRETATION: *Rules of the Court of Appeal 1994 – Rules 18(7) & (7A) – Whether there was mandatory requirement under r. 18(7) of Rules of the Court of Appeal 1994 ('RCA') to file record of appeal containing memorandum of appeal within 90 days of High Court's decision – Whether r. 18(7A) provides plaintiff 'shall' file memorandum of appeal within three weeks after being notified of availability of High Court's written judgment – Words employed in provision – 'Notwithstanding sub-r. (7)' – Whether r. 18(7A) should prevail over r. 18(7) of RCA*

The plaintiff filed a suit in the High Court against the defendants. The High Court delivered a decision in favour of the plaintiff. The defendants appealed to the Court of Appeal against the said High Court decision ('this appeal'). The defendants filed their record of appeal ('RA') on 17 May 2021 but omitted the memorandum of appeal ('MA') because the High Court's written judgment/ground of decision had not been provided by the High Court Judge ('HCJ') before the expiry of the 90 days period (filing of RA). Hence, the defendants could not prepare the MA and include it in the RA. The 90 days period (filing of RA) lapsed on 24 May 2021. On 21 December 2023, the second defendant filed a notice of motion in the Court of Appeal (encl. 7), applying for, among others, an extension of time from the Court of Appeal for the second defendant to file a MA. At the time of the filing of encl. 7, the High Court's written judgment/grounds of decision was not available. The HCJ provided a written judgment on 20 March 2024 with regard to the High Court's decision. On 20 April 2024, the second defendant filed and served a supplemental RA ('SRA') which contained the following documents (i) the High Court's written judgment; and (ii) the MA. The plaintiff objected

to encl. 7 on the grounds that (i) r. 18(7) of the Rules of the Court of Appeal ('RCA') employs an imperative term 'shall'. Consequently, r. 18(7) of the RCA imposes a mandatory obligation on the defendants to file the MA in the RA before the lapse of the 90 days period (filing of RA). The plaintiff relied on, *inter alia*, the broad grounds of the Court of Appeal decision in *Aliff Syukri Kamarzaman v. Mohamad Syazwan Shuhaimi* ('*Aliff Syukri*'); and (ii) the second defendant was guilty of inordinate delay of almost two and a half years from the date of the filing of the RA (17 May 2021) to the date of the filing of encl. 7 (21 December 2023) and there was no reasonable explanation for the second defendant's delay. The second defendant contended that, *inter alia* (i) there was an agreement between the parties for the MA to be filed only after the defendants had received the High Court's written judgment; (ii) the plaintiff was estopped from denying the alleged parties' agreement (extension of time to file MA); (iii) if encl. 7 was dismissed by the Court of Appeal, there would be grave injustice to the defendants; and (iv) the appeal had merits.

Held (allowing encl. 7)
Per Wong Kian Kheong JCA delivering the judgment of the court:

(1) Rule 94 of the RCA only allows parties to extend any time period stipulated in the RCA if there is consent in writing between the parties. The second defendant was not able to produce any written consent of the solicitors of all the parties in this appeal for an extension of time for the defendants to file the MA beyond the 90 days period (filing of RA). Furthermore, r. 94 of the RCA only permits one extension of time which cannot exceed 14 days. (para 16)

(2) In a scenario where the High Court's written judgment/grounds of decision is only available after the expiry of the 90 days period (filing of RA), r. 18(7) of the RCA does not mandatorily require an appellant to file a RA which contains a MA before the lapse of the 90 days period (filing of RA). Rule 18(7) of the RCA is subject to r. 18(7A) of the RCA due to the use of the word 'Notwithstanding' employed by the Rules committee in r. 18(7A) of the RCA. Rule 18(7A) has expressly provided that, in the mentioned scenario, an appellant 'shall' file the MA within three weeks after being notified of the availability of the High Court's written judgment/grounds of decision. If r. 18(7) of the RCA is mandatory, this would render r. 18(7A) of the RCA redundant. (paras 18-20)

(3) Rule 1A of the RCA provides that in the administration of the RCA, including r. 18(7) and (7A) of the RCA, the Court of Appeal 'shall have regard to the justice of the particular case and not only to the technical non-compliance' of r. 18(7) of the RCA. In a scenario where the High Court's written judgment/grounds of decision is only available after the expiry of the 90 days period (filing of RA), it was only in the

interest of justice for an appellant to file an SRA (containing the High Court's written judgment/grounds of decision and MA) within the three weeks period (r. 18(7A) of the RCA). This was because according to r. 18(1) of the RCA, a MA 'shall' set 'forth concisely and under distinct heads ... the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided' by the High Court. How could an appellant draft an MA when the High Court's written judgment/grounds of decision was not available? Furthermore, the High Court may not provide any oral reason when the High Court's decision is delivered. In such a situation, an appellant is hard pressed to draft a MA and the MA may consist of the speculation of the appellant's counsel on how the High Court's decision is arrived at and how the High Court Judge or Judicial Commissioner had erred in fact and/or in law. Accordingly, the above interpretation of r. 18(1), (7) and (7A) was in consonance with justice as mandated by r. 1A of the RCA. (para 20)

(4) The following practical benefit may ensue from the above interpretation of r. 18(7) and (7A) of the RCA (i) the Court of Appeal was not unduly burdened by the respondent's POs, respondent's dismissal/striking out applications, appellant's applications (extension of time) and amendment applications (MA); (ii) appellants do not have to prepare MAs without the benefit of the High Court's written judgment/grounds of decision; and (iii) both the appellants and respondents need not expand time, effort and costs in respect of the respondent's POs, respondent's dismissal/striking out applications, appellant's applications (extension of time) and amendment applications (MA). The above view regarding r. 18(7) and (7A) of the RCA does not cause any injustice to a respondent because the appeal is yet to be heard. There was no prejudice to a respondent in such circumstances. (para 20)

(5) Broad grounds provide a summary of the reasons for the decisions of the Court of Appeal. If an appeal to the Court of Appeal originates from the High Court, by way of the broad grounds, all the parties to an appeal can make an informed decision on whether to file an application to the Federal Court for leave to appeal against the Court of Appeal's decision. The broad grounds in *Aliff Syukri* were *per incuriam* r. 18(7A) of the RCA. Consequently, the broad grounds of *Aliff Syukri* did not bind this Court of Appeal in deciding encl.7. (paras 24 & 25)

(6) The second defendant's delay in filing the SRA (which contained the High Court's written judgment (this appeal) and MA) in this case was due solely to the non-availability of the High Court's written judgment. The second defendant was not guilty of any indolence. Thus, this court had no hesitation to apply r. 93 of the RCA and allow encl. 7. By allowing encl. 7, no prejudice was caused to the plaintiff because the plaintiff had not filed any written submission to oppose this appeal and

no hearing date had been fixed for this appeal. The second defendant had now filed the SRA and the hearing of this appeal would not be delayed any further. If there was any prejudice caused to the plaintiff by the court's granting of encl. 7, such a prejudice could be compensated by costs to be paid by the second defendant to the plaintiff. (para 31)

Per Azizul Azmi Adnan JCA (Concurring):

(1) The reasoning of the court in *Aliff Syukri* was clear, which was that r. 18(7A) does not have the effect of supplanting the mandatory rule in r. 18(7). Subrule 7 requires the memorandum of appeal to be filed within 90 days of the decision of the High Court. However, r. 18(7A) should prevail over r. 18(7). This was because of the plain words employed in the provisions. The use of the opening words 'Notwithstanding sub-r. (7)' in sub-r. 7A makes it abundantly clear that sub-r. 7A was to prevail over sub-r. 7. The court in *Aliff Syukri* did not appear to consider the effect of these words. (paras 41 & 42)

(2) Whether or not the broad grounds of judgment of a court may contain binding *ratio decidendi* must depend on a proper reading of the broad grounds issued in each case. The broad grounds of a case may contain a complete analysis of the issues at hand, but may omit a complete narration of the background facts. This should not relegate the grounds so issued into some lesser category of judgment. Thus, the *ratio decidendi* of a case in respect of which only broad grounds were issued would still operate as binding precedent for the purposes of the principle of *stare decisis*. Where, however, the Court of Appeal was presented with two conflicting prior decisions of the Court of Appeal, the court would be well entitled to prefer the decision containing the full grounds of judgment of the court, over the decision delivered only with broad grounds. (paras 143 & 44)

(3) The Federal Court in *Dalip Bhagwan Singh v. PP* explained the three exceptions to the general rule of *stare decisis*, one of which was the first exception, which was a decision of the Court of Appeal given *per incuriam* need not be followed. This court was constrained to find that this said exception applied, as the construction adopted by the court in *Aliff Syukri* could not be supported by the plain words employed in r. 18(7A) of the RCA. The import of the words 'Notwithstanding sub-r. (7)' in sub-r. 7(A) did not appear to have been brought to the attention of the court in *Aliff Syukri*. Had it been, that court would have arrived at a different conclusion. (paras 45 & 46)

Case(s) referred to:

Aliff Syukri Kamarzaman v. Mohamad Syazwan Shuhaimi (Civil Appeal No: B-02(NCvC)-695-04-2022) (Unreported) ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee [2003] 3 CLJ 161 HC ***(refd)***
Owners Of The Ship Or Vessel "SASACOM I" v. Bank Pembangunan Malaysia Bhd [2015] 1 CLJ 392 CA ***(refd)***
Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***
Viacor Asia Sdn Bhd v. Arokiasamy Thangaraju (Civil Appeal No: B-02(IM)(NCC)-1690-09-2022) (Unreported) ***(refd)***
Young v. Bristol Aeroplane Co Ltd [1944] KB 718 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
Insolvency Act 1967, s. 38(1)(a)
Rules of Court 2012, O. 14A
Rules of the Court of Appeal 1994, rr. 1A, 3A, 18(1), (7), (7A), (7B), 21(1), (3), 93, 94, 102, 105

For the 1st appellant - Hafizah Johor Ariff Johor; Malaysian Department of Insolvency
For the 2nd appellant - Kumaresan Thurairaju & Azleen Farahannis Evani Azlan; M/s Thurairaj T Kumar & Assocs
For the respondent - Praveena Sivanandan; M/s Seow & Megat

Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 7)

Wong Kian Kheong JCA (Majority):

Introduction

[1] This judgment discusses the following questions:

(i) whether r. 18(7) of the Rules of the Court of Appeal 1994 (RCA) has imposed a mandatory requirement for an appellant to file a record of appeal (RA) which contains a memorandum of appeal (MA) within 90 days from the date of the High Court's decision (90 days period (filing of RA)) when the High Court's "written judgment or grounds of decision" (High Court's written judgment/grounds of decision) is not available before the lapse of the 90 days period (filing of RA). This issue also concerns the following matters:

(a) an interpretation of rr. 1A, 18(1) and (7A) of the RCA; and

(b) from the viewpoint of the "*stare decisis*" doctrine, whether the "broad grounds" (broad grounds) of the Court of Appeal's decision in *Aliff Syukri Kamarzaman v. Mohamad Syazwan Shuhaimi*, Civil Appeal No. B-02(NCvC)-695-04-2022 (*Aliff Syukri*) binds the Court of Appeal with regard to the construction of r. 18(7) and (7A) of the RCA; and

(ii) if:

(a) rule 18(7) of the RCA mandatorily requires an appellant to file a RA which contains a MA before the expiry of the 90 days period (filing of RA); and

(b) the appellant has filed a RA within the 90 days period (filing of RA) but the RA does not contain the MA because the High Court's written judgment/grounds of decision is not available before the lapse of the 90 days period (filing of RA)

- can the respondent raise a preliminary objection (respondent's PO) or apply to the Court of Appeal to dismiss or strike out the appeal solely on the grounds that the appellant has failed to comply with the mandatory r. 18(7) of the RCA (respondent's dismissal/striking out application)?

when the respondent's PO has been raised or when the respondent's dismissal/striking out application has been filed, whether the appellant can file an application to the Court of Appeal pursuant to r. 93 of the RCA for an order to enlarge the 90 days period (filing of RA) so as to allow the appellant to file a supplemental RA (SRA), which contains the High Court's written judgment/grounds of decision and MA.

Background

[2] I shall refer to the parties as they were in the High Court.

[3] The plaintiff bank (plaintiff) had filed a suit in the High Court against the defendants (defendants).

[4] On 23 February 2021, the High Court had delivered a decision in favour of the plaintiff against the defendants (High Court's decision).

[5] The defendants appealed to the Court of Appeal against the High Court's decision (this appeal).

[6] The defendants filed their RA on 17 May 2021 (within the 90 days period (filing of RA)). However, the RA omitted the MA. This was because the High Court's written judgment/grounds of decision had not been provided by the learned High Court Judge (as he then was) before the expiry of the 90 days period (filing of RA). Hence, the defendants could not prepare the MA and include it in the RA.

[7] The 90 days period (filing of RA) lapsed on 24 May 2021.

[8] The first defendant (first defendant) was adjudicated by the court as a bankrupt on 22 September 2023. In this appeal, Puan Hafizah Johor binti Ariff Johor, a legal officer attached to the Malaysian Department of Insolvency, represented the first defendant. The Director General of Insolvency had given a sanction for the first defendant to proceed with this appeal pursuant to s. 38(1)(a) of the Insolvency Act 1967.

[9] On 21 December 2023, the second defendant (second defendant) filed a notice of motion in the Court of Appeal (encl. 7). Enclosure 7 had applied for, among others, an extension of time from the Court of Appeal for the second defendant to file a MA which had been exhibited as exh. "AAR-1" (MA (second defendant's affidavit)) in an affidavit affirmed by the second defendant on 21 December 2023 (filed in support of encl. 7).

[10] At the time of the filing of encl. 7, the High Court's written judgment/grounds of decision was not available.

[11] The learned High Court Judge provided a written judgment dated 20 March 2024 with regard to the High Court's decision (High Court's written judgment (this appeal)).

[12] On 20 April 2024, the second defendant filed and served a SRA which contained the following documents:

(i) the High Court's written judgment (this appeal); and

(ii) the MA.

Submission Of Parties

[13] The plaintiff's learned counsel, Ms Praveena Sivanandan, had objected to encl. 7 on the following grounds:

(i) rule 18(7) RCA employs an imperative term "shall". Consequently, r. 18(7) of the RCA imposes a mandatory obligation on the defendants to file the MA in the RA before the lapse of the 90 days period (filing of RA). The plaintiff's learned counsel had relied on three Court of Appeal's decisions, namely:

   (a) the judgment of Abdul Wahab Patail JCA in *Owners Of The Ship Or Vessel "SASACOM I" v. Bank Pembangunan Malaysia Bhd* [2015] 1 CLJ 392; [2015] 4 MLJ 841 (*SASACOM*);

   (b) the broad grounds in *Aliff Syukri*; and

   (c) *Viacor Asia Sdn Bhd v. Arokiasamy Thangaraju*, Civil Appeal No. B-02(IM)(NCC)-1690-09-2022 (*Viacor*); and

(ii) the second defendant was guilty of inordinate delay of almost 2½ years (from the date of filing of the RA (17 May 2021) to the date of filing of encl. 7 (21 December 2023)) (second defendant's delay (filing of encl. 7)) and there was no reasonable explanation for the second defendant's delay (filing of encl. 7).

[14] Mr Kumaresan a/l Thurairaju, the second defendant's learned counsel, had advanced the following contentions in support of encl. 7:

(i) there was an agreement between the parties' solicitors for the MA to be filed only after the defendants had received the High Court's written judgment (this appeal) (alleged parties' agreement (extension of time to file MA));

(ii) the plaintiff was estopped from denying the alleged parties' agreement (extension of time to file MA);

(iii) if encl. 7 is dismissed by the Court of Appeal, there would be a grave injustice to the defendants. This is because this appeal would be dismissed by the Court of Appeal without considering the merits of this appeal. If the Court of Appeal however allows encl. 7, there is no prejudice to the plaintiff because the plaintiff is still entitled to resist this appeal on its merits;

(iv) the Court of Appeal has inherent jurisdiction to allow encl. 7 in the interest of justice; and

(v) this appeal has merits as is evident in the MA (second defendant's affidavit). In any event, the SRA (which contained the MA) had now been filed in court enclosure no. 25.

Can Second Defendant Rely On Alleged Parties' Agreement (Extension Of Time To File MA)?

[15] Rule 94 of the RCA provides as follows:

> r. 94 **Enlargement of time by consent**
>
> **The time for** delivering, amending, or **filing any document may be enlarged once only by consent in writing without application to the Court or a Judge, but such enlargement shall not exceed fourteen days**.
>
> (emphasis added)

[16] I am not able to accept the alleged parties' agreement (extension of time to file MA). Firstly, r. 94 of the RCA only allows parties to extend any time period stipulated in the RCA if there is "consent in writing" between the parties. The second defendant is not able to produce any written consent of the solicitors of all the parties in this appeal for an extension of time for the defendants to file the MA beyond the 90 days period (filing of RA). Furthermore, r. 94 of the RCA only permits one extension of time, which cannot exceed 14 days.

Is There A Mandatory Requirement Under Rule 18(7) Of The RCA For An Appellant To File MA Within 90 Days Period (Filing Of RA)?

[17] I reproduce below rr. 1A, 3A, 18, 21, 93, 102 and 105 of the RCA:

> *r. 1A Court or Judge shall have regard to justice*
>
> *In administering any of [RCA] herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of [RCA] herein.*

r. 3A Preliminary objection on the ground of non-compliance shall not be allowed

A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of [RCA] unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

r. 18 Memorandum of appeal

(1) *The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided*; such grounds to be numbered consecutively.

(2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

(3) *The memorandum of appeal shall be substantially in Form 3 in the First Schedule.*

(4) *The appellant shall attach to such memorandum copies of the proceedings in the High Court,* including:

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given which may be recorded wholly or partly by mechanical means;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) *a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal*; and

(f) a copy of the notice of appeal.

(5) The memorandum of appeal and the copies of the documents specified in sub-r. (4) shall be clear and legible. The Registrar may reject any memorandum and the copies of the said document, if in his opinion they are not clear or illegible.

(6) A draft index of the documents to be included in the record of appeal shall be sent by the appellant's solicitors to the solicitors for the respondent who or (if more than one) any of whom may within forty-eight hours object to the inclusion or exclusion of any document. In the event of the parties being unable to agree, the

matter shall be referred to the Registrar of the High Court who may require the parties to attend before a Judge of the said Court. The Registrar of the High Court as well as the parties shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal taking special care to avoid the duplication of documents and unnecessary repetition of headings and other merely formal parts of documents. Where in the course of preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on its being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

(7) *The memorandum and copies referred to in subrule (4), which together shall be called the record of appeal, shall be filed at the Registry within ninety days from the date on which the decision appealed against was given.*

(7A) *Notwithstanding subrule (7), if any copy of the documents specified in paragraph (4)(b), (d) or (e) is not available within ninety days from the date on which the decision appealed against was given, the appellant shall file the copy of the documents together with the memorandum of appeal as supplementary records of appeal within three weeks of being notified of its availability.*

(7B) *Notwithstanding subrules (7) and (7A), if any copy of the documents specified in paragraph (4)(b) or (e) is not available after ninety days from the date on which the decision appealed against was given, the court may order the appellant to proceed with his appeal.*

(8) Sufficient copies of the record of appeal for the use of the Judges of the Court shall be sent to the Registrar when the record of appeal is filed.

(9) The appellant shall within the time limited for the filing of the record serve a copy thereof on each party who has been served with the notice of appeal.

(10) The appellant shall, when filing his record of appeal in the Registry, submit to the Registrar a chronology of events from the date the action or the application was filed in the High Court to the date of filing of the record of appeal in the Registry.

r. 21 Amendments

(1) *The Court may at any time allow amendment of* any notice of appeal, or notice of cross-appeal, or *memorandum of appeal*, or other part of the record of appeal *on such terms as it thinks fit.*

(2) *If the memorandum of appeal is not drawn up in the prescribed manner, the appeal may be dismissed.*

(3) *If any part of the record of appeal is not filed*, or any copy thereof is not supplied *within the prescribed time, and no sufficient ground is shown for the delay, the appeal may be dismissed*.

r. 93 *Power of Court or Judge to enlarge* or abridge *time.*

The Court or a Judge shall have power to enlarge or abridge *the time appointed by [RCA]*, or fix by an order enlarging time, *for doing any act* or taking any proceeding, *upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed*:

Provided that when the time for delivering any pleading or *document* or filing any affidavit, answer or document, or doing any act is or *has been fixed or limited by any of [RCA]* or by any direction on or under the summons for directions or by an order of the Court or a Judge *the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application*.

r. 102 *Non-compliance with [RCA] not to render proceedings void*

Non-compliance with any of [RCA], or with any rule of practice for the time being in force, *shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit*.

r. 105 Inherent powers of the Court.

For the avoidance of doubt, it is declared that nothing in [RCA] shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

(emphasis added)

[18] I will discuss the following three scenarios:

(i) the first scenario (first scenario) is when the High Court's written judgment/grounds of decision has been prepared within the 90 days period (filing of RA);

(ii) in the second scenario (second scenario), the High Court's written judgment/grounds of decision is only available after the expiry of the 90 days period (filing of RA); and

(iii) the High Court's written judgment/grounds of decision is not available for whatever reason (third scenario).

[19] In the first scenario, I am of the following opinion:

(i) in view of the employment of the imperative term "shall" in r. 18(7) of the RCA, r. 18(7) of the RCA mandatorily requires an appellant to file a RA which contains a MA within the 90 days period (filing of RA); and

(ii) if an appellant fails to comply with r. 18(7) of the RCA, the appellant may apply to the Court of Appeal under r. 93 of the RCA for an extension of time (appellant's application (extension of time)) to file a SRA, which contains the High Court's written judgment/grounds of decision and MA – please refer to para. 28 below.

[20] With regards to the second scenario, I am of the view that r. 18(7) of the RCA does not mandatorily require an appellant to file a RA which contains a MA before the lapse of the 90 days period (filing of RA). This view is supported by the following reasons:

(i) rule 18(7) of the RCA is subject to r. 18(7A) of the RCA due to the use of the word "notwithstanding" employed by the Rules Committee in r. 18(7A) of the RCA. The effect of the term "notwithstanding" has been explained by Low Hop Bing J (as he then was) in the High Court case of *OCBC Bank (Malaysia) Bhd v. Tan Eng Kwee* [2003] 3 CLJ 161, at 165, as follows:

> *The phrase "Notwithstanding sub-s. (2)" in s. 8(2A) [of the then named Bankruptcy Act 1967] means that s. 8(2) is to be disregarded in so far as it is inconsistent with s. 8(2A) so that the provisions of s. 8(2A) shall prevail and play a predominant role to the exclusion of s. 8(2) which has been rendered subservient to s. 8(2A).*
>
> (emphasis added)

(ii) rule 18(7A) of the RCA has expressly provided that in the second scenario, an appellant "shall" file the MA within three weeks after being notified of the availability of the High Court's written judgment/grounds of decision (three weeks period (r. 18(7A) of the RCA)). If r. 18(7) of the RCA is mandatory in the second scenario, this will render r. 18(7A) of the RCA redundant;

(iii) rule 18(7A) of the RCA has been inserted by the Rules Committee with effect from 1 August 2012 by way of the Rules of the Court of Appeal (Amendment) 2012 (PU(A) 234/12) (2012 Amendment (RCA)). In the case of the second scenario, if r. 18(7) of the RCA mandatorily requires an appellant to file a RA which contains a MA before the lapse of the 90 days period (filing of RA), this will defeat the purpose of the 2012 amendment (RCA) which has expressly inserted r. 18(7A) of the RCA;

(iv) rule 1A of the RCA provides that in the administration of the RCA, including r. 18(7) and (7A) of the RCA, the Court of Appeal "shall have regard to the justice of the particular case and not only to the technical non-compliance" of r. 18(7) of the RCA.

With regards to the second scenario, it is only in the interest of justice for an appellant to file a SRA (containing the High Court's written judgment/grounds of decision and MA) within the three weeks period (r. 18(7A) of the RCA). This is because according to r. 18(1) of the RCA, a MA "shall" set "forth concisely and under distinct heads, ... the

grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided" by the High Court. How can an appellant draft a MA when the High Court's written judgment/grounds of decision is not available? Furthermore, the High Court may not provide any oral reason when the High Court's decision is delivered. In such a situation, an appellant is hard-pressed to draft a MA and the MA may consist of the speculation of the appellant's learned counsel on how the High Court's decision is arrived at and how the learned High Court Judge or Judicial Commissioner has erred in fact and/or in law (appellant's speculation). Accordingly, the above interpretation of r. 18(1), (7) and (7A) of the RCA is in consonance with justice as mandated by r. 1A of the RCA;

(v) the above construction of r. 18(7) and (7A) of the RCA is supported by the following practical considerations:

(a) if r. 18(7) of the RCA mandatorily requires an appellant to file a RA which contains a MA before the expiry of the 90 days period (filing of RA):

(1) within the 90 days period (filing of RA), a RA has to be filed which contains a MA (that may comprise the appellant's speculation). Upon an appellant's failure to comply with r. 18(7) of the RCA, the appellant's application (extension of time) has to be filed;

(2) after the High Court's written judgment/grounds of decision is available, an appellant may file a notice of motion for leave of the Court of Appeal under r. 21(1) of the RCA to amend the MA based on the High Court's written judgment/grounds of decision (amendment application (MA)); and

(3) the respondent may object to the appellant's application (extension of time) or amendment application (MA);

(b) if r. 18(7A) of the RCA prevails over r. 18(7) of the RCA:

(1) an appellant is only required to file a RA (without a MA) within the 90 days period (filing of RA); and

(2) when the appellant receives the High Court's written judgment/grounds of decision, the appellant is only obliged to file a SRA (containing the High Court's written judgment/grounds of decision and MA) within the three weeks period (r. 18(7A) of the RCA); and

(c) the following practical benefit may ensue from the above interpretation of r. 18(7) and (7A) of the RCA:

(1) the Court of Appeal is not unduly burdened by the respondent's POs, respondent's dismissal/striking out applications, appellant's applications (extension of time) and amendment applications (MA);

(2) appellants do not have to prepare MAs without the benefit of the High Court's written judgment/grounds of decision; and

(3) both the appellants and respondents need not expend time, effort and costs in respect of the respondent's POs, respondent's dismissal/striking out applications, appellant's applications (extension of time) and amendment applications (MA);

(vi) the above view regarding r. 18(7) and (7A) of the RCA does not cause any injustice to a respondent because the appeal has yet to be heard. I am unable to foresee any prejudice to a respondent in such circumstances. Furthermore, when the appeal is subsequently heard, the respondent is still entitled to oppose the appeal on its merits to the hilt; and

(vii) cases decided before the introduction of r. 18(7A) of the RCA have to be read with caution.

[21] With respect to the following two Court of Appeal cases relied on by the plaintiff's learned counsel:

(i) the facts in *SASACOM* did not concern the application of r. 18(7) and (7A) of the RCA; and

(ii) in *Viacor*, the "case management system" (CMS) records showed that on 14 September 2023, the Court of Appeal (comprising Hanipah Farikullah, See Mee Chun and Dr Choo Kah Sing JJCA) had allowed the appellant's application for, among others, an order that the filing of the SRA (containing the MA) after the expiry of the 90 days period (filing of RA) was valid and deemed to have complied with r. 18(7) and (7A) of the RC. In any event, the Court of Appeal has not delivered a written judgment in *Viacor*.

[22] In the third scenario, *ie*, the High Court's written judgment/grounds of decision is not available at all, I am of the following view:

(i) rule 18(7B) of the RCA empowers the Court of Appeal to order an appellant to proceed with the appeal (order (appeal without the High Court's written judgment/grounds of decision)); and

(ii) even though the appellant does not have the benefit of the High Court's written judgment/grounds of decision, the order (appeal without the High Court's written judgment/grounds of decision) should include an order for the appellant to file a MA. In the exceptional circumstances

as in the third scenario, the MA will then assist the parties and the Court of Appeal to decide the appeal when the High Court's written judgment/grounds of decision is not available.

Effect Of Broad Grounds

[23] In *Aliff Syukri*, the Court of Appeal has delivered the following broad grounds (quoted *verbatim* in its entirety based on CMS records):

> *This is our decision on preliminary objection raised by the respondent's counsel. We have considered the rival contention of both parties in respect of the preliminary objection. We have considered issues that have been raised and we come to unanimous decision. It is our considered view that the PO raised by the respondent has substance and merit in law and the facts as well as shown by chronology of events that have been referred to us. Order 18 Rule 7 of COA [sic] in our view is mandatory provision and calls for strict compliance. It is very clear the existence of Rule 7A [sic] is not in our view exception to mandatory requirement under Rule 7 [sic] one of which is to file memorandum of appearance together with record of appeal there is no exception to that. Moreover, on the facts before us rule 7A [sic] cannot be invoked by the appellant as they were till today there is no ground of judgment received by the appellant. If ground of judgment received then there is prescribed period to file a memorandum of appeal this does not refer to memorandum of appeal that is required to be filed in the appeal record itself. Importantly from the record brief were in fact pronounced by the learned judge which to us are quite clear as to the reasons why the application was allowed by the learned judge. As such there was clearly no reasonable explanation for the non-filing of the memorandum of appeal as required at the first stage itself. Filing of the memorandum of appeal of an inordinate delay merely at the convenience of appellant on the basis that no full ground of judgment received would in our view set an unhappy precedent contrary to an intention and mischief of the Rules of Court of Appeal to promote fair and expeditious disposal of appeals. Hence, we are constrained to allow the preliminary objection raised by the respondent and accordingly struck out the appeal. Cost of RM2,000.00 subject to allocatur.*
>
> (emphasis added)

[24] Firstly, broad grounds are important for the following reasons:

(i) broad grounds provide a summary of the reasons for the decisions of the Court of Appeal. All the parties to an appeal to the Court of Appeal and their learned counsel (especially the party who is not successful in the appeal), are entitled to know the reasons for the Court of Appeal's decision, especially when the appeal emanates from a subordinate court and the decision of the Court of Appeal is therefore final;

(ii) if an appeal to the Court of Appeal originates from the High Court, by way of the broad grounds, all the parties to an appeal and their learned counsel can make an informed decision on whether to file an application to the Federal Court for leave to appeal against the Court of Appeal's decision (leave application (Federal Court)); and

(iii) broad grounds may assist the Federal Court to decide leave applications (Federal Court).

[25] Initially, from the viewpoint of the *stare decisis* doctrine, I had my doubts on whether a *ratio decidendi* can be extracted from broad grounds. I have however been provided with a draft judgment prepared by my learned brother, Azizul Azmi Adnan JCA (Azizul Azmi Adnan JCA's judgment). Having read Azizul Azmi Adnan JCA's judgment, I agree with its contents that, with the greatest respect, the broad grounds in *Aliff Syukri* are *per incuriam* r. 18(7A) of the RCA. Consequently, the broad grounds in *Aliff Syukri* do not bind this Court of Appeal in deciding encl. 7.

Should Court Of Appeal Dismiss Or Strike Out Appeal Merely Due To Appellant's Breach Of Rule 18(7) Of The RCA?

[26] I will now assume that r. 18(7) of the RCA is mandatory and has been breached by an appellant (breach (r. 18(7) of the RCA)). In the event of a breach (r. 18(7) of the RCA), how should the Court of Appeal decide on the following matters:

(i) the respondent's PO;

(ii) the respondent's dismissal/striking out application; and

(iii) the appellant's application (extension of time).

[27] Firstly, with regards to the respondent's PO and respondent's dismissal/striking out application, I express the following opinion:

(i) according to r. 102 of the RCA, a breach (r. 18(7) of the RCA) "shall not render any proceedings void". In other words, the Court of Appeal cannot allow the respondent's PO and respondent's dismissal/striking out application solely on the grounds that a breach (r. 18(7) of the RCA) has been committed;

(ii) by virtue of r. 3A of the RCA, the respondent's PO can only be allowed if the breach (r. 18(7) of the RCA) has caused "a substantial miscarriage of justice" to the respondent. As explained in the above sub-para. 20(vi), I am not able to see any prejudice, let alone a substantial miscarriage of justice, which can be caused to the respondent due to the breach (r. 18(7) of the RCA);

(iii) rule 21(3) of the RCA only allows the Court of Appeal to dismiss an appeal due to a delay in the filing of a RA if "no sufficient ground is shown for the delay". The fact that the High Court's written judgment/grounds of decision is not available is a sufficient ground to explain the delay in filing a RA or SRA, which contains the High Court's written judgment/grounds of decision and MA;

(iv) if the respondent's PO or respondent's dismissal/striking out application is allowed (Court of Appeal's dismissal/striking out (appeal)), there may be irreparable prejudice to the appellant as follows:

(a) the appeal is dismissed or struck out without its merits being heard and decided by the Court of Appeal;

(b) if the appeal originates from a subordinate court, the Court of Appeal's dismissal/striking out (appeal) is final; or

(c) if the appeal emanates from the High Court, the appellant has no right under s. 96(a) of the Courts of Judicature Act 1964 (CJA) to apply to the Federal Court for leave to appeal against the Court of Appeal's dismissal/striking out (appeal). Section 96 of the CJA is reproduced below:

> s. 96 *Conditions of appeal*
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, *an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:*
>
> (a) *from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage*; or
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.
>
> (emphasis added)

An appellant cannot apply to the Federal Court for leave to appeal against the Court of Appeal's dismissal/striking out (appeal) because the Court of Appeal's dismissal/striking out (appeal) is not a "judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction" within the meaning of s. 96(a) of the CJA; and

(v) if the breach (r. 18(7) of the RCA) has occasioned any prejudice to the respondent, the court should consider the fact that such a prejudice may be compensated in the form of costs to be paid by the appellant to the respondent.

[28] With regards to the appellant's application (extension of time), the following matters are pertinent:

(i) the delay in filing the MA may have been caused solely by the non-availability of the High Court's written judgment/grounds of decision. In such a case, the appellant cannot be guilty of any delay, let alone inordinate delay, in filing a RA or SRA, which contains the High Court's written judgment/grounds of decision and MA;

(ii) if the court allows the appellant's application (extension of time), there is no injustice to the respondent – please refer to the above sub-para. 20(vi). Even if there is any prejudice caused to the respondent, such a prejudice may be compensated by an order of costs to be paid by the appellant to the respondent; and

(iii) if the appellant's application (extension of time) is refused, there will be an injustice to the appellant, as explained in the above sub-para. 27(iv).

Can Court Of Appeal Resort To Rule 105 Of The RCA, Its Inherent Jurisdiction And/Or Inherent Power To Decide Enclosure 7?

[29] It is clear from the following two judgments of our highest courts that if the court is conferred a power by an express statutory provision, the court cannot then resort to the court's inherent jurisdiction and/or inherent powers:

(i) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244; [1988] 1 MLJ 178, at 181; and

(ii) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court case of *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 CLJ 405; [2009] 6 MLJ 307, at [28].

[30] As r. 93 of the RCA has expressly conferred a discretionary power on the Court of Appeal to decide encl. 7, I cannot therefore accede to the submission by the second defendant's learned counsel for this court to invoke r. 105 of the RCA, the Court of Appeal's inherent jurisdiction and/or inherent power.

Outcome Of Enclosure 7

[31] I have no hesitation to apply r. 93 of the RCA and allow encl. 7. The following reasons support this exercise of discretion:

(i) the second defendant's delay in filing the SRA (which contained the High Court's written judgment (this appeal) and MA) in this case was due solely to the non-availability of the High Court's written judgment (this appeal). In other words, the second defendant was not guilty of any indolence;

(ii) by allowing encl. 7, no prejudice is caused to the plaintiff because:

(a) the plaintiff has not filed any written submission to oppose this appeal; and

(b) no hearing date has been fixed for this appeal;

(iii) the second defendant has now filed the SRA and the hearing of this appeal will not be delayed any further; and

(iv) if there is any prejudice caused to the plaintiff by the court's granting of encl. 7, such a prejudice can be compensated by costs to be paid by the second defendant to the plaintiff.

[32] Premised on the above reasons, encl. 7 is allowed with the following order:

(i) an extension of time and leave of the Court of Appeal is granted for the second defendant to file the SRA (which included the MA); and

(ii) the second defendant shall pay costs of encl. 7 in a sum of RM2,000 to the plaintiff.

[33] I have forwarded a draft copy of this judgment to my learned brothers, Ravinthran N Paramaguru and Azizul Azmi Adnan JJCA. Both of them have expressed their concurrence with this judgment.

Azizul Azmi Adnan JCA (Concurring):

[34] I have had the benefit of reading in draft the grounds of judgment of Wong Kian Kheong JCA. I agree with the views of my learned brother. I address below the question of whether the broad grounds of judgment of a court would operate as binding precedent for the purposes of the principle of *stare decisis*.

[35] The background facts of the case are as set out in paras. 2 to 12 in the judgment of Wong Kian Kheong JCA, and I respectfully adopt them here.

[36] In *Aliff Syukri Kamarzaman v. Mohamad Syazwan Shuhaimi* (B-02(IM)(NCvC)-695-04/2022), the Court of Appeal struck out the defendant's appeal on account of failure by the defendant to file the memorandum of appeal within the time prescribed under r. 18(7) of the Rules of the Court of Appeal 1994. The plaintiff respondent in that case had sued for (among others) for profits accrued in an unincorporated joint venture between the parties for the establishment of a restaurant known as Restoran Rumah Makan Terlajak Laris. The defendant counterclaimed, alleging that separate garnishee proceedings commenced at the Magistrates, Court (commenced by a third party) had damaged the defendant's reputation.

[37] The plaintiff applied under O. 14A of the Rules of Court 2012 for the determination of three preliminary points of law. On 18 March 2022, the High Court determined the application in favour of the plaintiff and dismissed the defendant's counterclaim. The defendant appealed against this decision by way of a notice of appeal dated 14 April 2022. The defendant filed his memorandum of appeal on 7 July 2023, even though the full grounds of judgment of the High Court were not yet available. Nor was it available by the time the appeal came to be heard before the Court of Appeal. Trial of the main action was then on going.

[38] Even though the full grounds of judgment of the High Court had not been issued by the time of the hearing of the appeal, the reasoning employed by the High Court was recorded in the e-Review System, by which the decision of the High Court was delivered.

[39] Before the Court of Appeal, the plaintiff respondent in that case raised a preliminary objection, contending that there had been non-compliance with r. 18 of the Rules of the Court of Appeal 1994.

[40] The Court of Appeal upheld this preliminary objection. The following are the broad grounds of the Court of Appeal in *Aliff Syukri* as recorded in the minutes of the case management system (CMS):

> This is our decision on preliminary objection raised by the respondent's counsel. We have considered the rival contention of both parties in respect of the preliminary objection. We have considered issues that have been raised and we come to unanimous decision. It is our considered view that the PO raised by the respondent has substance and merit in law and the facts as well as shown by chronology of events that have been referred to us. Order 18 Rule 7 of COA in our view is mandatory provision and calls for strict compliance. It is very clear the existence of Rule 7A is not in our view exception to mandatory requirement under Rule 7 one of which is to file memorandum of appearance together with record of appeal there is no exception to that. Moreover, on the facts before us rule 7A cannot be invoked by the appellant as they were till today there is no ground of judgment received by the appellant. If ground of judgment received then there is prescribed period to file a memorandum of appeal this does not refer to memorandum of appeal that is required to be filed in the appeal record itself. Importantly from the record brief were in fact pronounced by the learned judge which to us are quite clear as to the reasons why the application was allowed by the learned judge. As such there was clearly no reasonable explanation for the non-filing of the memorandum of appeal as required at the first stage itself. Filing of the memorandum of appeal of an inordinate delay merely at the convenience of appellant on the basis that no full ground of judgment received would in our view set an unhappy precedent contrary to an intention and mischief of the Rules of Court of Appeal to promote fair and expeditious disposal of appeals. Hence, we are constrained to allow the preliminary objection raised by the respondent and accordingly struck out the appeal. Cost of RM2000.00 subject to allocatur.

[41] In my considered view, the reasoning of the court in *Aliff Syukri* is clear, which was that r. 18(7A) does not have the effect of supplanting the mandatory rule in r. 18(7). Subrule 7 requires the memorandum of appeal to be filed within 90 days of the decision of the High Court.

[42] My learned brother Wong Kian Kheong JCA is of the view that – and I fully agree – r. 18(7A) should prevail over r. 18(7). This is because of the plain words employed in the provisions. The use of the opening words "Notwithstanding sub-r. (7)" in sub-r. 7A makes it abundantly clear that sub-r. 7A is to prevail over sub-r. 7. The court in *Aliff Syukri* did not appear to consider the effect of these words.

[43] Whether or not the broad grounds of judgment of a court may contain binding *ratio decidendi* must depend on a proper reading of the broad grounds issued in each case. The broad grounds of a case may contain a complete analysis of the issues at hand but may omit a complete narration of the background facts. This should not relegate the grounds so issued into some lesser category of judgment. Thus, in my view, the *ratio decidendi* of a case in respect of which only broad grounds were issued will still operate as binding precedent for the purposes of the principle of *stare decisis* as explained in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718, and as applied by the Federal Court in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645.

[44] Where, however, the Court of Appeal is presented with two conflicting prior decisions of the Court of Appeal, the court would be well-entitled to prefer the decision containing the full grounds of judgment of the court, over the decision delivered only with broad grounds.

[45] The Federal Court in *Dalip Bhagwan* explained the three exceptions to the general rule of *stare decisis* in the following manner:

> [T]he relevant *ratio decidendi* in *Young v. Bristol Aeroplane*'s case is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given *per incuriam* need not be followed, secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one, thirdly, it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords.

[46] In the present case, I was constrained to find that the first of the exceptions applied, as the construction adopted by the court in *Aliff Syukri* cannot be supported by the plain words employed in r. 18(7A) of the Rules of the Court of Appeal 1994. As explained, the import of the words "Notwithstanding sub-r. (7)" in sub-r. (7A) did not appear to have been brought to the attention of the court in *Aliff Syukri*. Had it been, I am assured that court would have arrived at a different conclusion.